

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 07-10260-RGS

PAUL M. DEMBLING

v.

CAROLYN SABOL, Warden,
Federal Medical Center, Devens¹

ORDER ON PETITIONER'S MOTION
FOR PRELIMINARY INJUNCTION

February 22, 2007

STEARNS, D.J.

Petitioner Paul Dembling was sentenced by the court on December 6, 2006, to a guidelines term of ten months incarceration followed by a period of supervised release. Because petitioner fell within Zone C, the court ordered five months of custody, with a recommendation that he be committed to a community corrections center (half-way house), with an additional five months of home detention to be served as a condition of his supervised release. Among its reasons, the court indicated its desire that petitioner continue employment given the critical role that he plays in the survival of the company for which he works. The court scheduled a surrender date of January 25, 2007.

Upon surrendering, petitioner was assigned to the prison camp at the FMC-Devens facility. The Bureau of Prisons (BOP), citing 28 C.F.R. §§ 570.20 and 570.21, refused to exercise the discretion conferred by 18 U.S.C. § 3621(b), and to consider a placement in a half-way house. Petitioner has moved on an expedited basis for an injunction ordering

¹Carolyn A. Sabol replaced David Winn as warden of FMC-Devens on January 16, 2007.

the BOP to exercise its statutory discretion consistent with its policy prior to December 2002.² A hearing was held today, February 22, 2007, on the motion.

The BOP's "categorical" refusal to exercise discretion in circumstances such as this has been a matter of controversy within this district and within the federal court as a whole. Some of my colleagues have sided with the BOP, although a plurality to date (including Judges Young, Zobel, Tauro, and Ponsor) has ruled otherwise. The two most able expositions of the competing views, to my mind, have been those of Judge Saylor in Bullock v. Winn, 06-CA-40147-FDS (D. Mass. Nov. 8, 2006) (siding with the BOP), and of Judge Saris in Putnam v. Winn, 441 F.Supp. 2d 253 (D. Mass. 2006) (siding against). While this is an issue over which reasonable minds can differ, I differ with Judge Saylor's conclusion that Congress has not spoken directly to the issue and that deference therefore should be accorded the BOP's regulatory determination. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-844 (1984). Rather, I agree with Judge Saris in her reliance on the holding of Woodall v. Federal Bureau of Prisons, 432 F.3d 235, 244 (3d Cir. 2005), that the BOP regulations "are invalid because the BOP may not categorically remove its ability to consider the explicit factors set forth by Congress in § 3621(b) for making placement and transfer determinations." Because, in my judgment, all that can usefully be said on the subject has been said by Judge Saylor

²The action is brought pursuant to 28 U.S.C. § 2241. The government no longer contests in this context a claim of jurisdiction under the habeas statute. I am also informed by the government that the issue is presently on appeal before the First Circuit Court of Appeals with the appellant's brief due in March. While I would ordinarily find it prudent to await the First Circuit's decision, to do so in this case would be to deprive petitioner of any prospect of relief as the decision is unlikely to be reached before his committed sentence is served.

and by Judge Saris, I will simply adopt the reasoning of Judge Saris's opinion and say no more.

ORDER

For the reasons stated, the motion for a preliminary injunction is ALLOWED. The court ORDERS that, within ten calendar days of the date of this Order, the BOP reconsider, in good faith and in accordance with the standards employed by the BOP prior to December of 2002, and without consideration of 28 C.F.R. §§ 570.20 and 570.21, petitioner's placement in a community corrections center. An affidavit shall be filed with the court demonstrating compliance within twenty-one days of the date of this Order.

SO ORDERED.

/s/ Richard G. Stearns

UNITED STATES DISTRICT JUDGE